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Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

TEMPLE BNAI SHALOM OF GREAT NECK,
a Corporation Organized under the
New York Religious Corporation Law,

Petitioner,

v.

VILLAGE OF GREAT NECK ESTATES
and FLORENCE RISMAN, COUNTY CLERK OF
NASSAU COUNTY and STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE SUPREME COURT,
APPELLATE DIVISION, SECOND DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Have the New York State courts refused to apply the rule of law established in *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708 (2006) where in this case they held that Petitioner Temple Bnai Shalom of Great Neck ("petitioner") was not deprived of due process under the United States Constitution when, pursuant to the applicable New York State statute, Respondent Florence Risman sent petitioner a notice of redemption of its property after a tax sale by certified mail only which was returned by the Post Office as unclaimed, and neither Ms. Risman nor Respondent Village of Great Neck Estates took any additional steps to notify petitioner of its right to redeem the property ?

LIST OF PARTIES

The parties below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, Petitioner hereby states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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The Decision and Order of the New York State Supreme Court, Appellate Division, Second Department is reported at *Temple Bnai Shalom of Great Neck v. Village of Great Neck Estates*, 32 A.D.3d 391, 820 N.Y.S.2d 104 (2d Dept. 2006). The New York State Court of Appeals denied petitioner's motion for leave to appeal and appeal as of right on constitutional grounds on May 3, 2007. 8 N.Y.3d 813, 868 N.E.2d 235, 836 N.Y.S.2d 552 (2007). By Order rendered on September 6, 2007 the New York State Court of Appeals denied petitioner's motion for reargument of the motion for leave to appeal. 9 N.Y.3d 899, 874 N.E.2d 745, 842 N.Y.S.2d 778 (2007).

The orders and judgment of New York State Supreme Court, Nassau County, affirmed by the Appellate Division, Second Department are unreported. *See* Appendices A-F.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

The Decision and Order of the New York Supreme Court, Appellate Division, Second Department was rendered on August 1, 2006. In an Order entered November 16, 2006, the Second Department denied petitioner's timely motion for leave to appeal to the New York State Court of Appeals. In an Order rendered May 3, 2007 the New York State Court of Appeals denied petitioner's motion for leave to appeal and appeal as of right on constitutional grounds. By Order rendered on

September 6, 2007 the New York State Court of Appeals denied petitioner's motion for reargument of the motion for leave to appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New York Real Property Tax Law § 1464(1)

§ 1464. Application for deed; conveyance by village treasurer

> 1. If any parcel of real property sold for taxes pursuant to section fourteen hundred fifty-four of this chapter is not redeemed within a period of two years, the owner of the certificate of sale may commence an action to foreclose his tax lien pursuant to law or may make application for conveyance to him by deed of the real property described in such certificate. Before making such application the owner of such tax certificate shall serve a notice to redeem by certified or registered mail upon the record owner, and mortgagee if any, of the real property affected by such tax certificate by mailing the same to him using his name and address as it appears on the records of the collecting officer. *** If the real property or any part thereof is in the actual occupancy of any person, a further notice to redeem shall be served on the occupant personally, by leaving the same at the residence of the occupant with a person of suitable age and discretion belonging to his family or by mailing the same by certified or registered mail. ***

Constitution of the United States

Amendment XIV

Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

When Ona Guthartz ("Mrs. Guthartz"), the owner of the real property located at 68 Clover Drive, Great Neck Estates, New York ("the property"), failed to pay the 1996-1997 Village of Great Neck Estates ('the Village") real property taxes when due, the Village held a public sale of tax liens in 1998, including the lien on the property. Notice of the tax lien sale was solely by publication pursuant to the statutory provisions of New York Real Property Tax Law ("NY RPTL") § 1452. Respondent Florence Risman ("Ms. Risman") purchased the tax lien for the property for $7,568.98 in April 1998.

Unaware of the sale of the tax lien on her property, Mrs. Guthartz sold the property to petitioner by deed dated December 29, 2000 for $965,000, the fair market value of the property. Alan Guthartz ("Mr. Guthartz"), Mrs. Guthartz's husband and President of petitioner, performed the title search by searching the records of the Nassau County Clerk. He did not search the public records of the Village where the Village tax records were maintained. Therefore, he did not discover record of the unpaid 1996-1997 taxes and the sale of the tax lien to Ms. Risman. In January 2001 petitioner notified the Village that it had acquired title to the property and applied for an exemption from real property taxes.

Upon the expiration of the statutory waiting period, Ms. Risman followed the procedure required by NY RPTL § 1464 to notify interested persons of the right to redeem the property from the tax lien which she had purchased. On May 24, 2001 Ms. Risman sent a "Notice of Redemption of Lands Sold for Taxes by Village" to petitioner, Mrs. Guthartz, and Mr. Guthartz, by certified mail, return receipt requested only as required by the statute, informing them that they had six months within which to redeem the property from the tax lien, or the property would be sold to Ms. Risman. Ms. Risman's affidavit of service of the notice of redemption states that "she caused to be served the above notice by Certified Mail, Return Receipt Requested, on each of the persons or corporations named therein ***." Ms. Risman submitted a further affidavit in November 2001 to the Village to obtain the Treasurer's Deed to the property and she swore "that she served the said Temple Bnai Shalom of Great Neck, Ona & Alan Guthartz a 'Notice of Redemption of Lands Sold for Taxes by Village' by certified mail on the 24th day of May, 2001 ***."

Thus, both of Ms. Risman's affidavits of service of the Notice of Redemption refer to service by certified mail, return receipt requested only, and there is no mention of regular mail service. It is undisputed by the parties that (1) each of the certified mailings were returned by the postal service to Ms. Risman as "unclaimed"; (2) Ms. Risman and the Village took no other steps to notify petitioner of its right to redeem the property after the certified mail notice was returned unclaimed; (3) petitioner never received or claimed the Notice of Redemption sent by certified mail; and (4) petitioner failed to redeem the property from the tax lien within the statutory time period. On December 7, 2001 the Village issued a Treasurer's Deed to the property to Ms. Risman.

Petitioner commenced this action in August 2002 to vacate the Treasurer's Deed from the Village to Ms. Risman as unconstitutional. Petitioner's Amended Verified Complaint alleges that the State mandated procedures followed by the Village and Ms. Risman are unconstitutional because they deprived petitioner of its property without due process of law.

By Order dated August 20, 2004, New York State Supreme Court, Nassau County held that petitioner lacked standing to challenge the constitutionality of the tax lien sale since it was not the record owner at the time the lien was issued or at the time of the tax lien sale, and that petitioner was not entitled to notice of the sale because its existence was unknown. In an Order dated May 4, 2005, the court denied petitioner's motion to renew and reargue, and held that it did not overlook or misapprehend petitioner's due process argument.

Judgment was entered against petitioner on May 25, 2005 which ordered, adjudged and decreed that petitioner be barred from all claims to an interest in the property, and granted Ms. Risman an absolute and unencumbered title in fee simple. The Judgment also awarded Ms. Risman possession of the property and directed the Sheriff of Nassau County to eject petitioner from the property and put Ms. Risman in possession.[1]

Petitioner appealed to New York Supreme Court, Appellate Division, Second Department. After briefing was completed, but before oral argument in the Appellate Division on May 26, 2006, this Court rendered its decision in *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708 (2006). In a Decision and Order rendered on August 1, 2006 New York Supreme Court, Appellate Division, Second Department affirmed the Judgment of New York Supreme Court. *Temple Bnai Shalom of Great Neck v. Village of Great Neck Estates*, 32 A.D.3d 391, 820 N.Y.S.2d 104 (2d Dept. 2006), *lv. denied*, 8 N.Y.3d 813, 868 N.E.2d 235, 836 N.Y.S.2d 552, *reargument denied*, 9 N.Y.3d 899, 874 N.E.2d 745, 842 N.Y.S.2d 778 (2007).

The Appellate Division held that

> Risman provided the plaintiff with sufficient notice of the right to redeem the tax lien by sending notice by certified mail to the plaintiff, to the plaintiff's president, and to the former

1. Following entry of judgment, the property was apparently sold by Ms. Risman, and may have been sold again while appeal proceedings were pending in New York. All purchasers of the property have received actual notice of this action and the dispute regarding title to the property.

> owner, who was also the president's spouse. The fact that the notices were returned 'unclaimed' after numerous attempts at delivery did not render the notices deficient *** as 'the means selected for providing notice was "reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity" ' to redeem the outstanding tax lien (*Matter of Beckman v. Greentree Sec.*, 87 N.Y.2d 566, 570, 640 N.Y.S.2d 845, 663 N.E.2d 886, *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 ***).

32 A.D.3d at 392, 20 N.Y.S.2d at 105. The court wrote that "[c]ontrary to the plaintiff's contention at oral argument, the recent decision in *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 does not compel a different conclusion." 32 A.D.3d at 392, 820 N.Y.S.2d at 105. The Appellate Division found *Jones* "factually inapposite to the matter before us." *Id.* at 393, 820 N.Y.S.2d at 106.

Petitioner timely moved for reargument or leave to appeal to the New York State Court of Appeals in the Appellate Division, Second Department, which denied the motion by Order entered on November 16, 2006. Petitioner's timely motion for leave to appeal in the New York State Court of Appeals was denied by Order entered on May 3, 2007. Petitioner's timely motion for reargument of its motion for leave to appeal in the New York State Court of Appeals was denied in an Order entered on September 6, 2007.

REASONS FOR GRANTING THE PETITION

In *Harner v. v. County of Tioga*, 5 N.Y.3d 136, 833 N.E.2d 255, 800 N.Y.S.2d 112 (2005), the New York State Court of Appeals left unanswered the question whether notice of the right to redeem a tax sale sent to the owner of record by certified mail only complies with constitutional due process requirements when the notice is returned as unclaimed and no further steps are taken to give actual notice to the owner.

In *Jones*, this Court answered the question, holding that when notice of a tax sale of property is sent by certified mail only to the property owner and it is returned by the post office unclaimed, the due process clause of the Fourteenth Amendment requires the state to take additional reasonable steps to attempt to provide actual notice to the owner before selling the property.

The state courts in New York have failed to apply the rule of law established by this Court in *Jones*, and have refused to apply it to find a returned certified mail notice of a tax sale is constitutionally deficient in cases decided since *Jones* was handed down by this Court. Instead, New York State courts have created what is in effect an irrefutable presumption that multiple attempts at serving a tax notice by certified mail to a current and correct address with no proof in the record that the owner and/or occupant were not home or were otherwise unavailable for delivery is constitutional on the ground that "the intended recipients simply were 'attempting to avoid notice by ignoring the certified mailings' and that attempts at alternative methods of giving notice were unnecessary and would prove futile." *Temple Bnai*,

32 A.D.3d at 393, 820 N.Y.S.2d at 106. This presumption is in stark conflict with the explicit holdings in *Jones* and the recent application of *Jones* by the Second Circuit in a case arising out of New York.

Thus, the state courts of New York have staked out a position in direct conflict with *Jones* and the federal courts in New York. The Supreme Court should grant certiorari, vacate the order of the Appellate Division, Second Department, and remand this matter for further proceedings or grant review to ensure that the state courts of New York do not ignore this Court's explicit holdings in *Jones*, and to ensure that citizens of New York receive equal treatment in state and federal courts.

I. REVIEW IS WARRANTED BECAUSE NEW YORK STATE COURTS HAVE FAILED TO APPLY OR REJECTED THE RULE OF LAW ESTABLISHED IN *JONES v. FLOWERS*

In this case, the Appellate Division, Second Department noted that *Jones* "involved a certified mailing of a notice of tax lien sale by a governmental official to a single address, and there was proof that the property owner had moved and that "[n]obody was home to sign for the letter" (126 S. Ct. at 1712)." 32 A.D.3d at 392, 820 N.Y.S.2d at 105-106. The court then purported to distinguish *Jones* on three factual grounds that clearly lack constitutional merit, thus demonstrating that it rejected application of the rule of law in *Jones*.

First, the court noted that whereas *Jones* involved notice of the sale of the tax lien, "in the case at bar, the notice of tax lien sale had already been given, and the

sale itself had already occurred. The certified mail notice in this case concerned the right to redeem ***." 32 A.D.3d at 393, 820 N.Y.S.2d at 106. This is a factual distinction without a constitutional difference. In fact, it is clear that a final notice of redemption is more critical and significant than the initial notice of a tax lien sale. The right to redeem the property from the tax lien sale before the deed to the taxpayer's property is passed by the municipality is the final step in the process and the final time that the property owner can avert the forfeiture of the property. Thus, if anything, due process must ensure that the final notice of redemption is sent in a constitutionally sufficient manner "reasonably calculated to reach the party." *Jones*, 126 S. Ct. at 1716; *Luessenhop v. Clinton County*, 466 F.3d 259, 262 (2d Cir. 2006), *rev'g*, 378 F. Supp. 2d 63, 71-72 (N.D.N.Y. 2005) (*Jones* applies equally to a "final redemption notice" as to an initial notice of tax lien sale).

Second, the New York court wrote that "[t]he certified mail notice in this case *** was sent not by a governmental entity or official, but by the private citizen who previously had purchased the tax lien." 32 A.D.3d at 393, 820 N.Y.S.2d at 106. Notably, neither the Village nor Ms. Risman ever argued below that petitioner's constitutional challenge could be rejected because no due process claim could be made where the notice was sent by a private individual pursuant to the state statute that established the mandatory procedures for providing the notice, specifically NY RPTL § 1464. Clearly, Ms. Risman's action in sending the notice of redemption by certified mail only and her inaction in taking no additional steps to give notice when all three certified mailings were returned to her "unclaimed," and the

Village's conduct in providing Ms. Risman with a Treasurer's deed to the property after she supplied this proof to the Village constitutes "state action" for purposes of the due process clause of the Constitution. *See, e.g., Dennis v. Sparks*, 449 U.S. 24, 101 S. Ct. 183, 186 (1980) ("to act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting *** 'under color' of law for purposes of § 1983 actions"); *West v. Atkins*, 487 U.S. 42, 108 S. Ct. 2250 (1988); *Kia P. v. McIntyre*, 235 F.3d 749, 755 (2d Cir. 2000) ("The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.").

Notably, in contrast with its decision in this case, the Appellate Division, Second Department has subsequently applied *Jones* in a case where the notice of tax foreclosure was also sent, as required by the Nassau County Administrative Code, by the lien holder rather than "a governmental entity or official." 32 A.D.3d at 393, 820 N.Y.S.2d at 106; *see 89 Pine Hollow Road Realty Corp. v. American Tax Fund, Foothill*, 41 A.D.3d 771, 840 N.Y.S.2d 85 (2d Dept. 2007).

Third, the Second Department noted that in *Jones* only one certified mailing was sent, whereas in this case "multiple mailings were sent to the various potential recipients at their current and correct addresses, and

were returned unclaimed only after repeated attempts at delivery had been made" and there was no proof that "any of the potential recipients was not at home or was otherwise legitimately unavailable to sign for the mailing." 32 A.D.3d at 393, 820 N.Y.S.2d at 106. This purported distinction by the Appellate Division directly conflicts with this Court's explicit rule of law in *Jones:*

> The return of the certified letter marked "unclaimed" meant either that *Jones still lived at 717 North Bryan Street, but was not home when the postman called and did not retrieve the letter at the post office,* or that Jones no longer resided at that address. *One reasonable step primarily addressed to the former possibility would be for the State to resend the notice by regular mail, so that a signature was not required.* The Commissioner says that use of certified mail makes actual notice more likely, because requiring the recipient's signature protects against misdelivery. But that is only true, of course, when someone is home to sign for the letter, or to inform the mail carrier that he has arrived at the wrong address. *** [T]he use of certified mail might make actual notice less likely in some cases – the letter cannot be left like regular mail to be examined at the end of the day, and it can only be retrieved from the post office for a specified period of time. ***
>
> Other reasonable follow up measures, directed at the possibility that Jones had moved *as well as that he had simply not retrieved the*

> *certified letter, would have been to post notice on the front door, or to address otherwise undeliverable mail to "occupant."* Most States that explicitly outline additional procedures in their tax sale statutes require just such steps. See n 2, supra. Either approach would increase the likelihood that the owner would be notified that he was about to lose his property, given the failure of a letter deliverable only to the owner in person. *That is clear in the case of an owner who still resided at the premises.*

547 U.S. at 234, 126 S. Ct. at 1718-1719 (emphasis supplied).

Thus, in *Jones*, just as in this case, it was undisputed that the address to which the notice was sent by certified mail was correct, and that Jones's daughter lived at the property when the notice of tax sale was sent by certified mail and she failed or refused to claim it. Moreover, the Appellate Division, Second Department clearly overlooked the undisputed fact that multiple certified mailings were sent in *Jones*, and the Commissioner also published notice of the public sale in a local newspaper. Thus, in the fourth consecutive year that Jones failed to pay his taxes, the Commissioner sent Jones a certified letter that was returned "unclaimed," but two years later the Commissioner published a notice of public sale in the local newspaper, and several months after the publication, the Commissioner sent another certified letter to Jones informing him of a third-party's offer to purchase the property, which was also returned as "unclaimed." *Id.* at 223-224, 126 S. Ct. at 1712. As the Supreme Court stated in *Jones*: "We do not think that a

person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. *** Although the State may have made a reasonable calculation of how to reach Jones, it had good reason to suspect when the notice was returned that Jones was "no better off than if the notice had never been sent." *Id.* at 230, 126 S. Ct. at 1716.

Thus, *Jones* rejects what the Second Department here called a "strong inference," but has in reality been applied by several New York State courts as an "irrefutable presumption" that multiple attempts at serving a tax notice by certified mail to a current and correct address with no proof that the owner and/or occupant were not home or were otherwise unavailable for delivery is constitutional on the ground that "the intended recipients simply were 'attempting to avoid notice by ignoring the certified mailings' and that attempts at alternative methods of giving notice were unnecessary and would prove futile." 32 A.D.3d at 393, 820 N.Y.S.2d at 106, *quoting Harner v. County of Tioga*, 5 N.Y.3d at 141, 833 N.E.2d at 258, 800 N.Y.S.2d at 115; *citing Matter of County of Clinton v. Bouchard*, 29 A.D.3d 79, 83, 810 N.Y.S.2d 565 (3d Dept. 2006); *Luessenhop v. Clinton County*, 378 F. Supp. 2d 63, 71-72 (N.D.N.Y. 2005), *rev'd*, 466 F.3d 259 (2d Cir 2006).

In *Matter of County of Clinton v. Bouchard*, 29 A.D.3d 79, 810 N.Y.S.2d 565 (3d Dept. 2006), the New York Supreme Court, Appellate Division, Third Department relied on the Northern District of New

York's decision in *Luessenhop*, which was later reversed, and articulated this "irrefutable presumption" as follows:

> The fact that the certified mail – sent to the correct address – was returned as "unclaimed" after several notices were left during delivery attempts does not render petitioner's efforts at personal notice constitutionally infirm ***.
>
> Here, unlike mail returned as "undeliverable" *** when the mail was returned to petitioner as "unclaimed," which did not connote an invalid address, petitioner could have reasonably believed that respondent was attempting to avoid notice by ignoring the certified mailings (*see Matter of Harner v County of Tioga*, *supra* at 141, 800 N.Y.S.2d 112, 833 N.E.2d 255). Indeed, petitioner's subsequent verification that the notice had been sent to the correct address would support that conclusion and no further search was required (*see Kennedy v Mossafa*, *supra* at 10, 759 N.Y.S.2d 429, 789 N.E.2d 607; *Luessenhop v Clinton County, N.Y.*, 378 F.Supp.2d 63, 72 [2005], *supra*).

29 A.D.3d at 83, 810 N.Y.S.2d at 569.

Similarly, in *89 Pine Hollow Road Realty Corp. v. American Tax Fund, Foothill*, 41 A.D.3d 771, 840 N.Y.S.2d 85 (2d Dept. 2007), the New York Supreme Court, Appellate Division, Second Department refused to apply the explicit rule of law established by *Jones* in an action to set aside a deed issued in a tax lien foreclosure proceeding. The defendant, ATF, as the lien

holder, had the obligation to notify the plaintiff – by certified mail – of its intent to accept conveyance of the subject property from the County Treasurer pursuant to its purchase of a tax lien to the property under the applicable provisions of the Nassau County Administrative Code. *Id.* at 772-773, 840 N.Y.S.2d at 87. It was undisputed that the certified mail notice was sent to the correct and current address, it was retuned unsigned with the word "Refused" handwritten on it and the envelope containing the notice unopened, the tenant at the premises refused to accept receipt of the notice, and no further attempt was made to notify the plaintiff of the foreclosure. *Id.* at 773, 840 N.Y.S.2d at 87.

Although the Appellate Division found a question of fact whether the plaintiff was deprived of due process in receiving notice under *Jones*, it did so only because "[u]nder the unusual circumstances presented, including the death of the [plaintiff's] officer and sole shareholder just 11 days before service of the notice by ATF, the constitutional adequacy of the notice ought not to be determined in this case without the benefit of a full evidentiary record." *Id.* at 774, 840 N.Y.S.2d at 88. The Appellate Division denied the defendant's motion for summary judgment dismissing the complaint and cancelling a notice of pendency only as premature, with leave to renew upon completion of discovery, whereas under *Jones* the court should have granted summary judgment to the plaintiff and held the notice of tax foreclosure unconstitutional under the undisputed facts of the case.[2]

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2. Notably, the same New York appellate court that rejected the application of *Jones* in this case on the grounds that the (Cont'd)

See also Bourne v. New York City Water Bd., 15 Misc.3d 1109(A), 836 N.Y.S.2d 497 (Sup. Ct., Kings Co. 2007) (even if notice of intent to surcharge properties sent to the property owners were returned unclaimed, notice would not be deficient, citing *Temple Bnai Shalom v. Village of Great Neck Estates*, 32 A.D.3d 391, 392, 820 N.Y.S.2d 104 (2006); *cf. County of Sullivan v. Basile*, 43 A.D.3d 598, 840 N.Y.S.2d 676 (3d Dept. 2007) (notice of tax foreclosure proceeding sent by regular and certified mail and neither returned constitutes sufficient notice under constitutional due process, citing *Jones*).

II. REVIEW IS WARRANTED BECAUSE THERE IS UNEQUAL APPLICATION OF *JONES V. FLOWERS* AND TREATMENT OF PROPERTY OWNERS BETWEEN NEW YORK'S STATE AND FEDERAL COURTS

Unlike the New York State courts, the Second Circuit, applying *Jones* to a case arising out of New York, has rejected this "irrefutable presumption" when multiple certified mailings are returned unclaimed from the correct and current address of the property owner and found that such notice violates due process. Thus, a clear and unequal dichotomy has developed between litigants in New York's state and federal courts over the

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(Cont'd)

"certified mail notice *** was sent not by a governmental entity or official, but by the private citizen who previously had purchased the tax lien" as required by NY RPTL § 1464, 32 A.D.3d at 393, 820 N.Y.S.2d at 106, had no trouble applying *Jones* in *ATF* where the notice was also sent, as required by the Nassau County Administrative Code, by the lien holder rather than "a governmental entity or official." *Id.*

application of *Jones* and the constitutionality of multiple unclaimed certified mailings of a final redemption notice.

Luessenhop v. Clinton County, 378 F. Supp. 2d 63 (N.D.N.Y. 2005), *rev'd* 466 F.3d 259 (2d Cir. 2006), *on remand*, 2007 WL 1063650 (N.D.N.Y. 2007), involved four consolidated appeals. In one case, Luessenhop was the owner of two parcels of land located in Clinton County, New York, but her permanent address was 2944 Upton Street, N.W., Washington, D.C. At times during 2002, however, she temporarily lived in London, England. In the early 1990s, Luessenhop frequently did not timely pay her property taxes. However, when the County would send her a notice of foreclosure, i.e., a "final redemption notice," it was her practice to pay a sufficient amount of the back taxes to avoid losing title to her property. *Id.* at 262. In 2000 and 2001 Luessenhop fell behind on her taxes again. The County first sent a notice of arrears to Luessenhop's D.C. address, via regular mail, in January 2002 without response. On October 4, 2002, the County sent Luessenhop a notice of foreclosure, by certified mail, explaining that due to her failure to satisfy her property tax debt, foreclosure proceedings had begun, and to avoid loss of ownership Luessenhop must pay her taxes or respond prior to January 17, 2003. This notice of foreclosure was, therefore, in effect a notice of redemption. In addition, the County posted a notice in the Clinton County Courthouse, and published a notice in two Clinton County newspapers once a week for three non-consecutive weeks. When the notice of foreclosure sent by certified mail was returned to the County as "unclaimed," the County's staff checked the tax rolls and confirmed that the D.C. address was correct, but the County undertook no further efforts to contact Luessenhop. *Id.* at 261-262.

Following Luessenhop's inaction, an order of default was signed and entered in 2003 immediately transferring title of Luessenhop's property to the County. Thereafter, Luessenhop offered to pay her tax debt but the County refused to accept the payment, explaining that January 17, 2003 was the "final day of redemption." *Id.* Luessenhop moved in New York State Supreme Court to vacate the default judgment, but her motion was denied, which was affirmed by the Appellate Division, Third Department. The New York State Court of Appeals dismissed her motion for leave to appeal. *Luessenhop v. Clinton County*, 100 N.Y.2d 637, 801 N.E.2d 418, 769 N.Y.S.2d 197 (2003). Luessenhop then filed this suit in the United States District Court for the Northern District of New York seeking, *inter alia*, an injunction preventing the County from auctioning her property, as well as actual and punitive damages. The District Court found, prior to the Supreme Court's decision in *Jones*, that the County's attempted notification was constitutionally adequate and it granted summary judgment for the County. 466 F.3d at 262.

The Second Circuit, reversed, vacated the judgment, and remanded for further proceedings, holding:

> Luessenhop's case is similar to the actual facts of *Jones*. In both cases the government sent the taxpayer a notice of foreclosure via certified mail. In both cases the item was returned as "unclaimed," and in both cases the government took no further action other than posting the notice in a newspaper. *Jones* held that this inaction renders the attempted notice constitutionally deficient, as long as additional

> steps are practicable. In Luessenhop's case, it would not have been a terrible burden for the County to take at least one of the steps suggested in Jones; viz., sending a first-class letter to Luessenhop's Washington, D.C. address. Accordingly, the County's effort to provide notice to Luessenhop was insufficient to satisfy due process. As such, the judgment of the district court is reversed and the case is remanded for proceedings consistent with this opinion.

Id. at 270. In fact, more steps were taken to provide notice to the property owner in *Luessenhop* than in *Jones* and certainly than in this case. Not only did the County check the address to be sure it was correct when the certified mail was returned "unclaimed," but it also posted a notice in the local courthouse and published the notice of redemption in a local newspaper. The Second Circuit found, however, that this additional measure "does not save the County's constitutionally inadequate notification." *Id.* at 270, n. 6.

Thus, merely by virtue of the fact that petitioner commenced this action in state court rather than in federal court in New York, petitioner has been deprived of due process in receiving adequate notice of the right to redeem its property from the tax sale conducted by the Village under a state statute, NY RPLR § 1464, that is clearly unconstitutional under *Jones*.

III. AN ORDER GRANTING CERTIORARI, VACATING THE JUDGMENT BELOW, AND REMANDING FOR FURTHER CONSIDERATION ("GVR") IS AN APPROPRIATE EXERCISE OF THIS COURT'S DISCRETIONARY CERTIORARI JURISDICTION IN THIS CASE

This Court has already granted certiorari, vacated a state court judgment, and remanded the case for reconsideration in light of *Jones*. *See Estate of Lowe ex rel. Harris v. Apex Tax Investments, Inc.*, __ U.S. __, 126 S. Ct. 2287 (2006), *vacating Apex Tax Invs., Inc. v. Lowe (In re County Collector)*, 217 Ill.2d 1, 838 N.E.2d 907 (2005) (notice of right to redemption constitutional despite certified mail returned unclaimed); *see Apex Tax Investments, Inc. v. Lowe (In re County Collector)*, 2007 Ill. LEXIS 450 (2007) (on remand). Although the petition for certiorari in this case was apparently pending when *Jones* was decided, this Court has also granted certiorari, vacated a lower court judgment, and remanded for reconsideration ("a GVR order") under other circumstances.

For example, in *Erickson v. Pardus*, __ U.S. __, 127 S. Ct. 2197 (2007), this Court recently issued a GVR order solely because "the holding [below] departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure ***." *Id.* Similarly, in *Youngblood v. West Virginia*, __ U.S. __, 126 S. Ct. 2188 (2006), the Supreme Court granted certiorari, vacated the state court judgment, and remanded for further proceedings although there was no new decision of this Court to be considered by the state court on remand.

As this Court explained in *Lawrence v. Chater*, 516 U.S. 163, 112 S. Ct. 604 (1996), "the GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices. We have GVR'd in light of a wide range of developments, including our own decisions ***." *Id.* at 166, 116 S. Ct. at 606. This case falls within the first category of GVR orders recognized in *Lawrence* – "intervening factors" – because it includes "at least Supreme Court decisions rendered so shortly before the lower court's decision that the lower court had no 'opportunity' to apply them." *Id.* at 169, 116 S. Ct. at 607. In *Lawrence* this Court noted that in *Robinson v. Story*, 469 U.S. 1081, 105 S. Ct. 583 (1984) "we GVR'd for further consideration in light of a Supreme Court decision rendered almost three months before the summary affirmance by the Court of Appeals that was the subject of the petition for certiorari." 516 U.S. at 169, 116 S. Ct. at 607.

Here, *Jones* was decided after briefing was completed in the Appellate Division, and only one month before oral argument of the appeal and three months before the court's short decision rejecting the application of *Jones*. Even where the recent Supreme Court precedent has been briefed to the lower court, this Court has issued an GVR order. *See id.* at 170, 116 S. Ct. at 608, *citing Stutson v. United States*, 516 U.S. 193, 116 S. Ct. 600 (1996). This is particularly appropriate where, as here, "recent events have cast substantial doubt on the correctness of the lower court's summary disposition." *Lawrence*, 516 U.S. at 170, 116 S. Ct. at 608. This Court has made clear that a GVR order is appropriate where, as here,

> recent developments that we have reason to believe the court below did not fully consider,

> reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation ***.

Id. at 167, 116 S. Ct. at 607. In fact, we know that the Appellate Division, Second Department has already reconsidered one of the facts that it used to distinguish *Jones* in this case, specifically that the notice was sent by the lienholder rather than the government. *See 89 Pine Hollow Road Realty Corp. v. American Tax Fund, Foothill*, 41 A.D.3d 771, 840 N.Y.S.2d 85 (2d Dept. 2007). On remand the Second Department would also have the benefit of the Second Circuit's decision in *Luessenhop*, 466 F.3d 259, applying *Jones* to facts virtually identical to the facts in this case.

Exercise of this Court's discretionary certiorari jurisdiction to issue a GVR order in this case will also "conserve[] the scarce resources of this Court that might otherwise be expended on plenary consideration, assist[] the court below by flagging a particular issue that it does not appear to have fully considered, *** and alleviate[] the '[p]otential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues, see *United States v. Johnson*, 457 U.S. 537, 555, n. 16, 102 S. Ct. 2579, 2591, n. 16 (1982)." *Lawrence*, 516 U.S. at 167, 116 S. Ct. at 606-607. A GVR order in this case will also "improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal ***." *Id.* at 168, 116 S. Ct. at 607.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Supreme Court grant certiorari.

DATED: December 5, 2007

Respectfully submitted,

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Attorneys for Petitioner

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APPENDIX

APPENDIX A — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED AUGUST 1, 2006

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

Argued - May 26, 2006

FRED T. SANTUCCI, J.P.
GABRIEL M. KRAUSMAN
WILLIAM F. MASTRO
PETER B. SKELOS, JJ.

2005-05783

Temple Bnai Shalom of Great Neck, etc.,

appellant,

v.

Village of Great Neck Estates, et al.,

respondents,

et al.,

defendants.

DECISION & ORDER

In an action, inter alia, for a judgment declaring a certain tax deed void, the plaintiff appeals from a judgment of the Supreme Court, Nassau County (Davis, J.), dated May 25, 2005, which, upon an order of the same

court dated May 4, 2005, inter alia, granting the cross motion of the defendant Florence Risman for summary judgment on her counterclaim to quiet title and, in effect, upon renewal, adhering to a prior determination of the same court denying that branch of the plaintiff's motion which was for leave to amend the complaint, barred the plaintiff from asserting any claims to the subject real property and declared that the defendant Florence Risman has absolute and unencumbered title in fee simple to the subject property.

ORDERED that the judgment is affirmed, with one bill of costs payable to the respondents.

The Supreme Court properly determined that the plaintiff did not have standing to challenge the constitutionality of the sale of the tax lien to the defendant Florence Risman and the notice provided by the defendant Village of Great Neck Estates with respect thereto (*see Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 769, 570 N.Y.S.2d 778, 573 N.E.2d 1034; *Matter of Dairylea Coop. v. Walkley*, 38 N.Y.2d 6, 9, 377 N.Y.S.2d 451, 339 N.E.2d 865). The plaintiff was not the record owner of the property subject to the lien at the time of the sale and failed to demonstrate that it suffered a cognizable injury as a result of any actions by the village (*see Matter of Galvani v. Nassau County Police Indem. Review Bd.*, 242 A.D.2d 64, 67, 674 N.Y.S.2d 690; *see also NYCTL 1996-1 Trust v. King*, 304 A.D.2d 629, 630-631, 758 N.Y.S.2d 374; *Bancplus Mortgage Corp. v. Galloway*, 203 A.D.2d 222, 223, 610 N.Y.S.2d 60).

Furthermore, with respect to the notice of redemption, Risman provided the plaintiff with sufficient notice of the right to redeem the tax lien by sending notice by certified mail to the plaintiff, to the plaintiff's president, and to the former owner, who was also the president's spouse. The fact that the notices were returned "unclaimed" after numerous attempts at delivery did not render the notices deficient (*see Matter of Harner v. County of Tioga*, 5 N.Y.3d 136, 138, 800 N.Y.S.2d 112, 833 N.E.2d 255), as "the means selected for providing notice was 'reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity' " to redeem the outstanding tax lien (*Matter of Beckman v. Greentree Sec.*, 87 N.Y.2d 566, 570, 640 N.Y.S.2d 845, 663 N.E.2d 886, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865; *see Kennedy v. Mossafa*, 100 N.Y.2d 1, 9-10, 759 N.Y.S.2d 429, 789 N.E.2d 607).

Contrary to the plaintiff's contention at oral argument, the recent decision in *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415 does not compel a different conclusion. While the United States Supreme Court determined that an unclaimed certified mail notice sent to the property owner's former address, without more, was insufficient to satisfy the requirements of due process under the circumstances there presented, *Jones v. Flowers*, *supra* involved a certified mailing of a notice of tax lien sale by a governmental official to a single address, and there was proof that the property owner had moved and that "[n]obody was home to sign for the

letter" (126 S.Ct at 1712). Under those circumstances, a majority of the Court reasoned that the State could not simply do nothing once it learned that the notice was unclaimed, but had to attempt some other means of providing notice to the property owner if practicable.

Jones v. Flowers, *supra* is factually inapposite to the matter before us. Indeed, in the case at bar, the notice of tax lien sale had already been given, and the sale itself had already occurred. The certified mail notice in this case concerned the right to redeem, and it was sent not by a governmental entity or official, but by the private citizen who previously had purchased the tax lien. Additionally, it is conceded that multiple mailings were sent to the various potential recipients at their current and correct addresses, and were returned unclaimed only after repeated attempts at delivery had been made. Moreover, there is no suggestion in this record that any of the potential recipients was not at home or was otherwise legitimately unavailable to sign for the mailing. Accordingly, considering the "unique information about [the] intended recipient[s]" (126 S.Ct at 1710) which can be gleaned from the history of this matter, and taking "into account the status and conduct of the owner in determining whether notice was reasonable" (*Kennedy v. Mossafa*, *supra* at 11, 759 N.Y.S.2d 429, 789 N.E.2d 607), the defendants could reasonably draw the strong inference that the intended recipients simply were "attempting to avoid notice by ignoring the certified mailings" (*Matter of Harner v. County of Tioga*, *supra* at 141, 800 N.Y.S.2d 112, 833 N.E.2d 255; *see Matter of County of Clinton v. Bouchard*,

29 A.D.3d 79, 810 N.Y.S.2d 565), and that attempts at alternative methods of giving notice were unnecessary and would prove futile.

The Court providently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to amend the complaint (*see Evans v. Ellis*, 13 A.D.3d 577, 786 N.Y.S.2d 334).

The plaintiff's remaining contentions either are unpreserved for appellate review, are without merit, or need not be reached in view of the foregoing.

SANTUCCI, J.P., KRAUSMAN, MASTRO and SKELOS, JJ., concur.

ENTER:

s/ James Edward Pelzer
James Edward Pelzer
Clerk of the Court

APPENDIX B — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK DATED MAY 4, 2005

SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

SUBMISSION DATE: 03/17/05
INDEX No.: 13603/02

TEMPLE BNAI SHALOM OF GREAT NECK,
a corporation Organized under the New York
Religious Corporation Law,

Plaintiff,

-against-

Village of Great Neck Estates, County Clerk of
Nassau County, Florence Risman, and
State of New York,

Defendants.

MOTION SEQ. #12, 13

The following papers read on this motion:

Notice of Motion/Order to Show Cause	X
Answering Papers	X
Reply	X
Briefs: Plaintiff's/Petitioner's	
Defendant's/Respondent's	

Appendix B

Upon the foregoing papers, plaintiff's motion for an order granting renewal of this Court's order dated August 20, 2004, upon renewal, permitting plaintiff to amend the complaint to add Ona Guthartz; to add additional causes of action; to grant reargument to plaintiff as to the awarding of summary judgment to Florence Risman and to amend the complaint to include a cause of action to quiet title is denied. Defendant Florence Risman's cross motion for an order granting summary judgment to her is granted.

The instant action stems from the sale of a 1998 village tax lien to the defendant Florence Risman by the defendant Village of Great Neck Estates. This Court, by order dated August 20, 2004, held that the plaintiff did not have standing to challenge the tax lien as they were not entitled to notice of the sale nor did they have standing to challenge the sale. The court further held that plaintiff was not entitled to attorneys fees and denied plaintiff's motion to amend the complaint for their failure to serve a copy of the proposed amendment with the motion and on the proposed intervener.

A motion to re-argue is to be granted when the court overlooks or misapprehends the law or facts in the determination of its prior decision. *CPLR § 2221* (d); see *Diorio v. City of New York*, 202 A.D.2d 625, 609 N.Y.S.2d 304 (2d Dept. 1994); *Pro Brokerage Inc. v. Home Ins. Co.*, 99 A.D.2d 971, 472 N.Y.S.2d 661 (1st Dept. 1984). The purpose of a motion to reargue is not to afford an aggrieved party a second chance. *Pro Brokerage, Inc. v. Home Ins. Co.*, supra. The party seeking a motion to

reargue must set forth the facts or law the court overlooked in making its original decision. The court did not overlook or misapprehend the facts as presented by the parties or misapplied the law. Accordingly, plaintiffs motion to re-argue is denied.

A motion to renew may be made upon the discovery of evidence that was not known to the party at the time of the initial motion. CPLR § 2221(e). A motion to renew is not a basis to set forth new theories of the case. *Foley v. Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588 (1st Dept. 1979). Additionally, the court may, in its discretion, grant a motion to renew which corrects a deficiency in the original motion papers. *Federal Home Loan Mortgage Corp. v. Torres*, 238 A.D.2d 306, 656 N.Y.S.2d 297 (2d Dept. 1997). Here, plaintiff seeks to renew their motion to amend the complaint to include Ona Guthartz as a party and to add a cause of action to quiet title. "Although leave to amend a complaint should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed amendment that is plainly lacking in merit will not be permitted." *Monteiro v. R.D. Werner, Inc.*, 301 A.D.2d 636, 754 N.Y.S.2d 328 (2d Dept. 2003); see also, *Gannett Suburban Newspapers v. El-Kam Realty Co.*, 306 A.D.2d 314, 760 N.Y.S.2d 680 (2d Dept. 2003); *Evans v. Ellis*, 13 A.D.3d 517, 786 N.Y.S.2d 334 (2d Dept. 2004). Here, the Court finds that the plaintiff has failed to make an evidentiary showing that the proposed amendment has merit.

Appendix B

In the August 20, 2004 decision, this Court held that plaintiff lacked standing to bring the instant action as well as the fact that the notice requirements were met by the defendants with regard to the lien sale. Based on that decision, this court finds that defendant Florence Risman is entitled to summary judgment on the RPAPL Article 15 claim.

The proposed order as annexed to the moving papers, shall be forwarded this date to the Motion Support Unit of this Court, and should it be found to be consistent with the terms of this and prior orders, it shall be executed upon completion of such review.

This decision constitutes the order and judgment.

Dated: MAY –4 2005

s/ Kenneth A. Davis
HON. KENNETH A. DAVIS

APPENDIX C — JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK DATED MAY 25, 2005

At an IAS Part 7 of the Supreme Court of the State of New York held in and for the County of Nassau at the Courthouse thereof, 100 Supreme Court Drive, Mineola, New York on the 25 day of May, 2005

PRESENT: KENNETH A. DAVIS

HON. KENNETH A. DAVIS
JUSTICE

INDEX NO.: 13603/02

TEMPLE BNAI SHALOM OF GREAT NECK, A CORPORATION ORGANIZED UNDER THE NEW YORK RELIGIOUS CORPORATION LAW,

Plaintiff,

-against-

VILLAGE OF GREAT NECK ESTATES, COUNTY CLERK OF NASSAU COUNTY, FLORENCE RISMAN, AND STATE OF NEW YORK,

Defendants.

Appendix C

JUDGMENT

Upon the Notice of Motion dated January 31, 2005, and the affirmation annexed thereto of JOSHUA LEVY, affirmed January 31, 2005, and the exhibits annexed thereto, and upon all the proceedings had hereon, and upon the Order of this Court dated August 20, 2004,

NOW, upon the motion of JOSHUA LEVY,

ORDERED that defendant FLORENCE RIMSAN'S motion is granted, and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff TEMPLE BNAI SHALOM OF GREAT NECK, and every person claiming under the plaintiff, be barred from all claim to an estate or interest in the real property described herein, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant FLORENCE RISMAN is vested with an absolute and unencumbered title in fee simple to real property described herein,

ORDERED, ADJUDGED AND DECREED that the defendant FLORENCE RIMSAN is awarded possession of the subject premises and that the defendant FLORENCE RIMSAN be put in possession thereof, and the plaintiff and any party claiming under the plaintiff in possession thereof be removed from possession, and it is further

Appendix C

ORDERED, that the Sheriff of Nassau County be and he hereby is ordered upon receipt of a certified copy of this order to enter upon the premises hereinafter described, commonly known as 68 Clover Drive, Great Neck, NY, and eject therefrom the plaintiff, and every person holding the same, or any part thereof, under the said plaintiff and adversely to the defendant FLORENCE RISMAN, and to put the defendant FLORENCE RISMAN into possession of the said premises occupied by said plaintiff or persons holding under them, and that this order be executed by the said Sheriff as though it were an execution for the delivery of possession of said premises, and it is further

ORDERED that the Nassau County Clerk is hereby directed upon payment of the proper fees, if any, to cancel and discharge a certain Notice of Pendency of Action filed by plaintiff in this action on August 16, 2002 against the subject premises, and said Clerk is hereby directed to enter upon the margin of the record of same a Notice of Cancellation referring to this order, and it is further

ORDERED, that the County Clerk, upon payment of the appropriate fees, index a copy of this Order and Judgment against the subject premises.

The subject premises hereinbefore mentioned is described as follows:

All that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being, and identified on the land and tax map

of the County of Nassau in the State of New York, as follows:

Section:	2
Block:	354
Lot(s)	90

Upon information and belief, said premises are also known as and by street number: 68 Clover Drive, Great Neck, NY.

ENTER: MAY 25 2005

s/ Kenneth A. Davis
HON. KENNETH A. DAVIS

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK DATED AUGUST 20, 2004

SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

SUBMISSION DATE: 07/15/04
INDEX No.: 13603/02

TEMPLE BNAI SHALOM OF GREAT NECK,
a corporation Organized under the New York
Religious Corporation Law,

Plaintiff,

-against-

Village of Great Neck Estates, County Clerk of
Nassau County, Florence Risman,
and State of New York,

Defendants.

MOTION SEQ. #8, 9, 10, 11

Appendix D

The following papers read on this motion:

Notice of Motion/Order to Show Cause	X
Answering Papers	X
Reply	X
Briefs: Plaintiff's/Petitioner's	
Defendant's/Respondent's	

Upon the foregoing papers, defendant Florence Risman's motion for an order awarding partial summary judgment to defendant Florence Risman and dismissing those parts of the complaint and causes of action which are founded upon the plaintiff's claim that the 1998 tax lien sale was unconstitutional and violative of plaintiff's due process rights is granted. Additionally, defendant Village of Great Neck Estates' cross motion for an order awarding partial summary judgment dismissing the complaint and each cause of action against the Village of Great Neck Estates and awarding partial summary judgment dismissing all claims for attorney's fees asserted by plaintiff against the Village is granted. Furthermore, plaintiff's cross-motion for an order granting summary judgment striking defendant Risman's second affirmative defense on lack of standing or in the alterative permitting plaintiff to add Ona Guthartz as an additional party plaintiff or as a defendant is denied.

The instant action stems from the sale of a tax lien by the Village of Great Neck Estates to defendant Florence Risman. The subject tax lien was for the year 1998, when the property was owned by Ona Guthartz.

In 2000, the property was sold to plaintiff. Plaintiff now seeks to challenge the constitutionality of the tax lien.

The Court finds that the plaintiff does not have standing to challenge the tax lien as it was not the owner of record at the time the lien was issued or at the time of the sale. Plaintiff claims that it was entitled to notice of the sale. The Court finds otherwise. The law provides that notice must be given to "all parties with a substantial interest in the property whose names and addresses are reasonably ascertainable." *Kahen-Kashi v. Risman*, __ A.D.3d __, 777 N.Y.S.2d 755 (2d Dept 2004); See, also, *Zaccaro v. Cahill*, 100 N.Y.2d 884, 768 N.Y.S.2d 730 (2003); *Garden Homes Woodlands Company v. Town of Dover*, 95 N.Y.2d 516, 720 N.Y.S.2d 79 (2000); *West Branch Realty v. County of Putnam*, 293 A.D.2d 528, 740 N.Y.S.2d 135 (2d dept 2002); RPTL § 1125. Plaintiff was not known to the defendants at the time of the sale nor were they an owner of the premises. Accordingly, they were not entitled to notice nor does it have standing to challenge the sale, therefore the motion and cross motion for partial summary judgment is granted.

Additionally, the Court finds that plaintiff has not set forth sufficient grounds to warrant the award of attorney's fees. See, *Luby v. St. John's Episcopal Hospital*, 220 A.D.2d 390, 631 N.Y.S.2d 773 (2d Dept 1995); *Mastroianni v. Inc. Village of Hempstead*, 166 A.D.2d 560, 560 N.Y.S.2d 843 (2d Dept 1990); *Kovachevich v. New York City Housing Auth.*, 290 A.D.2d 325, 735 N.Y.S.2d 782 (1st Dept 2002); *Harvey v. State*, 281 A.D.2d 846, 722 N.Y.S.2d 605 (3rd Dept 2001)

Appendix D

Plaintiff's motion to amend the complaint to add Ona Guthartz as an additional plaintiff or defendant is denied. Plaintiff failed to serve a copy of the proposed amendment with the motion papers, see, *Loehner v. Simons*, 224 A.D.2d 591, 639 N.Y.S.2d 700 (2d Dept 1996); *Branch v. Abraham and Strauss*, 220 A.D.2d 474; 632 N.Y.S.2d 168 (2d Dept 1995); *Langdon v. Town of Webster*, 182 Misc.2d 603, 698 N.Y.S.2d 393 (N.Y. Sup. Ct. 1999); *Katzeff v. Cohn*, 139 Misc.2d 1076, 529 N.Y.S.2d 436 (N.Y. Sup. Ct. 1988), nor was the proposed intervener served. The plaintiff application to strike the affirmative defense of lack of standing made by Risman is denied as moot.

This decision constitutes the order and judgment.

Dated: AUG 20 2004

s/ Kenneth A. Davis
HON. KENNETH A. DAVIS J.S.C.

APPENDIX E — ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK DENYING MOTION FOR REARGUMENT DATED SEPTEMBER 6, 2007

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth *day of* September 2007

2-10 Mo. No. 740

Temple Bnai Shalom of Great Neck, &c.,

Appellant,

v.

Village of Great Neck Estates et al.,

Respondents,

et al.,

Defendants.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix E

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

(2)

No. 07-760

FILED
JAN 3 - 2008
SUPREME COURT, U.S.

18

In The

Supreme Court of the United States

TEMPLE BNAI SHALOM OF GREAT NECK,
a Corporation Organized under the
New York Religious Corporation Law,

Petitioner,

v.

VILLAGE OF GREAT NECK ESTATES and
FLORENCE RISMAN, COUNTY CLERK OF
NASSAU COUNTY and STATE OF NEW YORK,

Respondents.

On Petition For A Writ Of Certiorari To The New York State Supreme Court, Appellate Division, Second Department

BRIEF IN OPPOSITION

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Florence Risman ("Risman") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Decision and Order of the New York State Appellate Division, Second Department. The Decision and Order of the Appellate Division, Second Department is published at 32 A.D.3d 391, 820 N.Y.S.2d 104 (2nd Dept. 2006), and is reproduced in the petitioner's Appendix at 1a-5a. The trial court's order granting summary judgment, order denying renewal, and judgment, all of which are unpublished, are reproduced at petitioner's Appendix at 14a-17a, 6a-9a, and 10a-13a, respectively. As more fully described below, the New York State Court of Appeals denied petitioner's motion for discretionary review by order entered on May 3, 2007.

STATEMENT OF THE CASE

The petitioner[1] was not the record owner of, and had no interest in, the subject

[1] In dismissing as a bad faith filing the Chapter 11 bankruptcy petition filed by the petitioner during the pendency of the State Court proceedings, the Bankruptcy Court raised certain questions regarding the legitimacy of the religious nature of the petitioner. *In re: Temple Bnai Shalom of Great Neck*, Case No. 04-80808-288 (U.S. Bankruptcy Court, Eastern District, NY). As explained by the Bankruptcy Court in its March 29, 2004 order dismissing the petition:

(Continued on following page)

property[2] at the time of the subject 1998 tax sale conducted by the Village of Great Neck Estates (the "Village"). The purchaser at the tax sale was Risman. After the duly noticed and conducted tax sale, the property was sold to the petitioner by Ona Guthartz ("Ms. Guthartz"), the owner of the property at the time of the tax sale. There was never any claim made by Ms. Guthartz, or anyone claiming on her behalf, that she suffered any loss as a result of alleged insufficient notice of the tax sale.[3]

> The only personal property owned by the Temple consists of a modest number of chairs, prayer shawls, and prayer books having nominal liquidation value. Oddly enough, the Temple does not claim to own a Torah, the first five books of the Old Testament, imprinted on scrolls, a suitable covering for the Torah, and the customary silver adornments atop these scrolls. * * * There is nothing in debtor's bankruptcy papers to suggest that there are any on-going religious services at the Temple.

[2] The subject property consists of a single family home located in a residential neighborhood. Pursuant to the petitioner's petition in bankruptcy, the petitioner did not own, lease, or occupy any other real property.

[3] Petitioner, in its Statement of the Case, states that Ms. Guthartz was unaware of the sale of the tax lien. However, Ms. Guthartz is not a party to this action, and at no point during the proceedings below was there ever any affidavit or statement submitted by Ms. Guthartz, or any other evidence submitted, to support such a claim. In fact, the allegation by petitioner that notice of the tax lien sale was given by publication only was not relevant since petitioner was not the owner of the subject property at the time of the 1998 tax sale.

When purchasing the subject property, petitioner, for unexplained reasons, failed to properly perform a customary and routine title search. Such search, whether properly performed by a qualified title examiner or lay person, would have revealed the existence of any outstanding tax liens and the fact that a tax sale had taken place.[4]

In 2001, and pursuant to the requirements of New York Real Property Tax Law §1464[5], Risman sent copies of the duly prepared notice by certified mail to: (1) the petitioner, the record owner at the time notice was sent by Risman, to its business mailing address, to wit: a Post Office box, (2) Alan Guthartz, the President of the Temple, and (3) Ms. Guthartz, at the subject property. It was never contested by the petitioner that each and every envelope was correctly addressed, and that each, after multiple

---

[4] The respondent Risman eventually had to pay $197,077.79 in additional Town, County, School and Village taxes, which included taxes not paid during Ms. Guthartz's and the petitioner's ownership of the subject property.

[5] Effective as of January 1, 1995, NY Real Property Tax Law §§1450-1464 and other New York statutes concerning tax enforcement were repealed by New York State Legislature and were replaced by the Uniform Delinquent Tax Enforcement Act. See NY Real Property Tax Law Article 11. However, the repeal of the statutes contained various savings clauses which permitted various municipalities to continue to enforce liens outside of the new Uniform Delinquent Tax Enforcement Act provisions, and permitted Incorporated Villages to continue to temporarily use the repealed NY Real Property Tax Law §§1450-1464 to enforce their taxes.

attempts at delivery, was unclaimed by each of the addressees.

At no point did petitioner ever offer any excuse or explanation as to why each and every one of the mailings was returned unclaimed, and has never offered any other alternative address that any further and/or different search of the public records would have revealed.

The Appellate Division, Second Department affirmed the New York Supreme Court's judgment in favor of the Village and Risman. *Temple Bnai Shalom of Great Neck v. Village of Great Neck Estates*, 32 A.D.3d 391, 820 N.Y.S.2d 104 (2nd Dept. 2006) *lv. denied*, 8 N.Y.3d 813, 868 N.E.2d 235, 836 N.Y.S.2d 552 (2007), *reargument denied*, 9 N.Y.3d 899, 874 N.E.2d 745, 842 N.Y.S.2d 778 (2007). In doing so, the Appellate Division, Second Department, upon due consideration of this Court's decision in *Jones v. Flowers*, 547 U.S. 220 (2006), correctly found the instant case to be factually inapposite to *Jones*.

Petitioner's Motion for Permission to Appeal to the New York State Court of Appeals was denied by the New York State Court of Appeals by order entered May 3, 2007. Petitioner's motion to reargue the petitioner's Motion for Permission to Appeal was denied by the New York State Court of Appeals by order entered on September 6, 2007. No motion for rehearing was ever made by the petitioner or any other party of the order which petitioner now seeks review of.

REASONS FOR DENYING THE PETITION

Not only is the petition not timely filed, but additionally, the petitioner fails to show any "compelling reasons" for the grant of the instant writ as required by Rule 10, and accordingly, the petition should be denied. The petitioner's disagreement with the Appellate Division, Second Department's August 1, 2006 Decision and Order, based on the Court's application and interpretation of the *Jones v. Flowers* decision, is not a compelling reason to grant the petition.

I. THE PETITION WAS NOT TIMELY FILED

The subject petition should have been filed within 90 days after the May 3, 2007 order of the New York State Court of Appeals denying petitioner's motion for discretionary review. Rule 13, para. 1. Petitioner's subsequent motion to the New York State Court of Appeals for leave to reargue the denial of petitioner's motion for discretionary review was not a motion for rehearing in the lower court that would extend the time for petitioning this Court. As explained in *Department of Banking v. Pink*, 317 U.S. 264 (1942), *reh'g denied*, 318 U.S. 801 (1943) a timely petition for rehearing in the lower court "operates to suspend the finality of the * * * court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." 317 U.S. at 266. In the instant case, petitioner never moved for a

rehearing relating to the judgment which petitioner now seeks review of. The decision and order of the Appellate Division, Second Department was a final adjudication of the rights of the parties and was entered by that Court on August 1, 2006. Accordingly, the instant petition was not timely filed.

II. THERE ARE NO REASONS, COMPELLING OR OTHERWISE, WHICH WARRANT THE GRANT OF THE INSTANT PETITION

The petition should also be denied because there are no conflicting decisions between the Courts, and each of the cases raised by petitioner in support of such a claim, to the extent relevant, are factually distinguishable. Furthermore, the Appellate Division, Second Department fully considered and correctly decided the issues involved and adequately distinguished this case from this Court's holding in *Jones*. The instant case represents the application of principles delineated by this Court in *Jones* to the unique and unusual set of facts and circumstances in this case. The real issue that the petitioner raises in support of its petition is whether the Appellate Division, Second Department properly considered this Court's decision in *Jones*. A review of the Appellate Division, Second Department's Decision and Order should lead to an affirmative answer. The petitioner's disagreement with Appellate Division, Second Department's application and interpretation of the *Jones* decision is not a compelling reason for the review of this case. In fact, the holding below has

limited implications, only impacts the parties herein, and the only issue to be addressed is the title to one particular parcel of land.

The law in New York, even prior to *Jones*, required that the State take additional reasonable steps to notify a property owner when notice of a tax sale sent by the State is returned undeliverable. *Kennedy v. Mossafa*, 100 N.Y.2d 1, 789 N.E.2d 607, 759 N.Y.S.2d 429 (2003) ("[W]e reject the view that the enforcing officer's obligation is always satisfied by sending the notice to the address listed in the tax roll, even where the notice is returned as undeliverable"). The Jones holding did nothing other than affirm the rule regarding notice as it already existed in New York.[6]

As correctly held by the Appellate Division, Second Department, the instant case is factually inapposite to *Jones*, including the fact that the notice of the tax sale in the instant case was previously provided by the Village. There was no supported meritorious issue raised by petitioner regarding the insufficiency of this notice. The notices that were returned unclaimed were not sent by the State, but rather were sent by Risman, the lien buyer. Regardless, Risman did take additional steps to notify the petitioner and based upon an exhaustive search of the

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[6] This Court granted certiorari in *Jones* to resolve a conflict among the Circuits and State Supreme Courts, and notably, cited the New York State Court of Appeals' case of *Kennedy v. Mossafa*, supra, as one of the cases on the "State must do something more" side of the conflict. 547 U.S. at 225.

public records, both at the County, Town, and local Village offices, sent notices not only to the petitioner, but also to the petitioner's president, and the president's wife.[7] No excuse was ever offered by the petitioner or any other party as to why the mail was returned unclaimed after repeated attempts at delivery and why there was no response to notices left regarding the attempted delivery. The Appellate Division, Second Department explained:

> [I]t is conceded that multiple mailings were sent to the various potential recipients at their current and correct addresses, and were returned unclaimed only after repeated attempts at delivery had been made. Moreover, there is no suggestion in this record that any of the potential recipients was not at home or was otherwise legitimately unavailable to sign for the mailing. 32 A.D.3d at 393, 820 N.Y.S.2d at 106.

As opposed to the occupant of the property in *Jones*, the petitioner in the instant case was also obligated to follow up with certified mail. The majority in *Jones*, in reply to an argument advanced by the State, explained that it is not the obligation of a tenant to follow up with certified mail. 547 U.S. at 233. However, in the case at bar, the certified mail

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[7] *Jones* involved a certified mailing sent by the State of a notice of tax sale to a single address, and there was proof that the property owner had moved, and that nobody was at the owner's former address to sign for the letter. 547 U.S. at 222.

was sent to the petitioner at its correct address, and it was the petitioner, not some tenant or occupant as in *Jones*, that should have followed up with the certified mail. The petitioner in the instant case bore the responsibility of claiming its mail, duly and correctly addressed, to protect its ownership interests, and cannot support a due process claim while neglecting or intentionally shirking this responsibility.

This Court recently denied a certiorari petition for a writ (see *Estate of Lowe ex rel. Harris v. Apex Tax Investments, Inc.*, ___ U.S. ___, 128 S. Ct. 253 (2007)), after the Illinois Supreme Court in *Apex Tax Investments, Inc. v. Lowe*, 225 Ill.2d 208, 867 N.E.2d 941 (2007), held again, after previous remand by this Court, for the tax lien purchaser.[8] The Illinois Supreme Court in *Apex*, after remand, just like the Appellate Division, Second Department in the instant case, held that *Jones* was factually distinguishable for various reasons, including that: (1) notice of the tax sale had previously been provided by the State; (2) the returned notice was not notice of the tax sale; (3) the returned notice was not sent by the State; and (4) the lien holder did, in fact, take additional steps to

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[8] The initial Illinois Supreme Court judgment in favor of the tax lien purchaser (*Apex Tax Investments, Inc. v. Lowe*, 217 Ill.2d 1, 838 N.E.2d 907 (2005)) was vacated by this Court and the case remanded for further consideration in light of *Jones*. See *Estate of Lowe ex rel. Harris v. Apex Tax Investments, Inc.*, ___ U.S. ___, 126 S. Ct. 2287 (2006)).

notify the property owner. In *Apex*, just like the instant case, notice of the actual tax sale was previously provided by the State, and the returned certified mail[9] at issue was sent not by the State, but rather by the tax purchaser.

Lowe, like *Jones*, and unlike the instant case, involved property owners that were not present or residing at the address to which the notices were sent. Jones had moved. Lowe was hospitalized. Similarly, in *Luessenhop v. Clinton County*, 466 F.3d 259 (2nd Cir. 2006), *rev'g* 378 F. Supp. 2d 63 (N.D.N.Y. 2005), the property owner to whom notice was sent by certified mail was temporarily residing out of the Country. 466 F.3d at 262. In the instant case, there was never any dispute that each and every one of the intended recipients of the mail had simply refused to accept the certified mail.

This is not a *Jones* case where there was an innocent well intentioned property owner that had moved. This is a case about a business enterprise that without excuse, valid or otherwise, failed to claim its mail. This Court should not condone such a practice. One who desires to receive notice would claim one's mail, and not purposely avoid and refuse it. The State should not have to force notice upon a party not desiring to receive it and one who is purposely avoiding it. Such a party, one that purposely avoids notice,

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[9] The notice in Apex was returned with the notation "Person is Hospitalized".

should not be able to offer its non-receipt as the grounds for a due process claim. The petitioner and its president chose a pattern of behavior and conduct which made notice difficult or impossible to properly effectuate, and which indicated a lack of due care and diligence. The petitioner cannot blame another for the unique situation that petitioner finds itself in.

Finally, the petitioner's argument that it is appropriate for this Court to grant certiorari, vacate the judgment, and remand for further consideration ("GVR") is clearly not supported by a simple reading of the Appellate Division, Second Department's Decision and Order. It is obvious that this Court's holding in *Jones* was fully considered by the Court below, and a GVR of this case will not result in a different decision in the lower Court. The Court below did not summarily decide this matter without adequately distinguishing it from this Court's holding in *Jones*, and accordingly, a GVR order is not appropriate.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: Buffalo, NY
January 3, 2008

Respectfully submitted,

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No. 07-760

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IN THE
Supreme Court of the United States

TEMPLE BNAI SHALOM OF GREAT NECK,
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Petitioner,

v.

VILLAGE OF GREAT NECK ESTATES and
FLORENCE RISMAN, COUNTY CLERK OF
NASSAU COUNTY and STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE SUPREME COURT, APPELLATE DIVISION,
SECOND DEPARTMENT

BRIEF IN OPPOSITION FOR RESPONDENT VILLAGE OF GREAT NECK ESTATES

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is a petition for certiorari timely under Rule 13 and 28 U.S.C. § 2101 when it is filed more than 90 days after entry of an order by New York's highest appellate court denying discretionary review, but is filed within 90 days after the same Court denies a motion for reargument of the order denying discretionary review?

2. Has the petitioner presented compelling reasons for obtaining review of an appellate court decision which considered and rejected a due process claim under *Jones v. Flowers*, where the evidence before it raised a "strong inference that the intended recipients [of a notice to redeem] were 'attempting to avoid notice by ignoring the certified mailings'"?

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STATEMENT OF THE CASE

The subject petition arises from an action to cancel a Treasurer's tax deed issued by the Village of Great Neck Estates (Village) to respondent Florence Risman (Risman) for property located at 68 Clover Drive in the Village.

The former owner of the property, Ona Guthartz, failed to pay Village property taxes when due, and a tax lien was sold to Risman. Thereafter, Ona Guthartz sold the property to Temple Bnai Shalom of Great Neck (Temple), an entity created by her husband, Alan Guthartz, for the apparent purpose of trying to obtain tax exempt status for the property.

Within the statutory period permitting her to do so, Risman mailed notices to redeem the tax lien to the Temple and to both Alan and Ona Guthartz. The notice to the Temple was sent to the address designated by it [PO Box 495, Great Neck NY], but the Temple failed to claim the notice from the post office and it was returned "unclaimed". Risman's notices to Alan and Ona Guthartz were mailed directly to 68 Clover Drive. They, too, were not claimed.

Upon the expiration of the statutory redemption period, and upon proof of Risman's compliance with the applicable statutory procedures, the Village issued a Treasurer's tax deed to Risman. Risman then commenced an action to validate that deed.

The Temple thereupon commenced an action to set aside the deed to Risman, claiming, *inter alia*, that the

Village's 1996-1997 tax lien sale was constitutionally defective on the ground that the prior owner, Ona Guthartz, had not been given proper notice of that lien sale.

After considerable litigation, several amendments of the complaint, and after dismissal of a bankruptcy proceeding found to have been filed by the Temple in bad faith, the Supreme Court of the State of New York concluded that the Temple did not have standing to raise the claim that Ona Guthartz had not received proper notice of the tax lien sale. The court also denied the Temple's motion to add Ona Guthartz as a party plaintiff, and determined in various Orders that (a) the tax lien sale had been proper, (b) the Village and Risman had followed proper procedures in enforcing that lien and in issuing the tax deed, (c) the claims against the Village were without merit, and (d) Risman was the proper owner of the title to the property.

The Temple appealed from various Orders adverse to it. Insofar as is relevant to this petition, the appeal included a claim that Risman's "failure to provide the Temple with actual notice of the right to redeem the tax lien" denied it due process. The Appellate Division, Second Department, rejected the contention.

In the Appellate Division's view, *Jones v. Flowers* was "factually inapposite" since the mailings "were sent to the various potential recipients at their current and correct addresses, and were returned unclaimed only after repeated attempts at delivery were made." The court added:

> [T]here is no suggestion in this record that any of the potential recipients was not at home or was otherwise legitimately unavailable to sign for the mailing. Accordingly, considering the 'unique information about [the] intended recipient[s]' [*Jones, supra*] (__ US __, 126 S Ct at 1716) which can be gleaned from the history of this matter, and taking 'into account the status and conduct of the owner in determining whether notice was reasonable' (*Kennedy v Mossafa*, [100 NY2d 1] at 11), the defendants could reasonably draw the strong inference that the intended recipients simply were 'attempting to avoid notice by ignoring the certified mailings' (*Matter of Harner v County of Tioga*, [5 NY3d 136] at 141; *see Matter of County of Clinton [Bouchard]*, 29 AD3d 79 [2006]), and that attempts at alternative methods of giving notice were unnecessary and would prove futile.

The Temple responded to the decision by first moving in the Appellate Division for leave to appeal to the Court of Appeals (as permitted by CPLR 5602). By order dated November 16, 2006, the Appellate Division denied the motion. The following month, the Temple timely moved in the Court of Appeals for leave to appeal. It claimed, as it had claimed on its earlier motion, that leave should be granted "to address the application of *Jones v. Flowers* to this case". The Village responded by distinguishing *Jones* and contending "if movant did not receive notice from Risman . . . that was the sole fault of movant, who refused to accept those notices

even though they were sent to the correct address." The opposition added:

> unlike the situation in *Jones*, where the mailings were sent to an incorrect address and no attempt was made to ascertain a correct one, the mailings here were sent to the correct address, as well as another address for Alan Guthartz, but the certified mail notice was returned 'unclaimed'. It should be clear that movant willfully sought to avoid notice, and now seeks relief based on its own willful acts. Risman and the Village have met all of their due process obligations; no research on the part of either of them would have disclosed any other address to which notice should be sent to movant as more likely to give it notice.

By order dated and entered May 3, 2007, the Court of Appeals denied the Temple's motion for leave to appeal. Notice of entry of the latter order was duly served upon the Temple's attorneys on May 9, 2007. Thereafter, the Temple's attorneys took the unusual step of moving for reargument of the order denying its motion for leave to appeal. By order dated September 6, 2007, the latter motion also was denied.

The instant petition was filed on December 5, 2007 — more than 7 months after entry of the Court of Appeals' May 3, 2007 order denying the Temple's as of right motion for leave to appeal. However, the petition does not include a copy of the Court of Appeals' May 3, 2007 order. Rather, it reprints only the Court's later order, dated September 6, 2007, denying the Temple's motion for reargument of the order denying its motion for leave to appeal.

REASONS FOR DENYING THE PETITION

I. The Petition is Untimely Under Rule 13.1

The only issue that warrants this Court's close attention is the timeliness of the petition. Rule 13.1 unambiguously provides that a petition "seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort" must be filed "within 90 days after entry of the order denying discretionary review." Since the subject petition was not filed within 90 days of the date when the Clerk of the New York Court of Appeals entered that Court's order denying petitioner's application for discretionary review (May 3, 2007), the petition is untimely as a matter of law, and this Court must dismiss it. *See Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

We anticipate that petitioner may argue in reply that the petition is timely under Rule 13.3. Such a contention would be meritless.

In pertinent part, Rule 13.3 provides "if a petition for rehearing is timely filed in the lower court by any party, . . . the time to file the petition for a writ of certiorari for all parties . . . runs from the date of the denial of rehearing . . ." This Court's precedents make plain that the intent of Rule 13.3 is to extend a party's time to petition for certiorari in cases where "[a] timely petition for rehearing . . . operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." *Missouri v. Jenkins*, *supra*, 495 U.S. at 46, quoting *Dept. of Banking of Nebraska v. Pink*, 317 U.S. 264, 266 (1942).

That rationale has no applicability here. Petitioner's motion to reargue the denial of its application for leave to appeal did *not* suspend the finality of the lower court orders that were the subject of the May 3, 2007 order denying leave. To the contrary, in the absence of a stay pursuant to the provisions of section 5519 of New York's Civil Practice Law and Rules (CPLR), the lower court's orders remained in full effect.

Accordingly, petitioner's motion for reargument of its motion for leave to appeal did *not* extend the time for petitioning, pursuant to Rule 13.3. Consequently, the petition is untimely under Rule 13.1 and 28 U.S.C. § 2101(c), and must therefore be dismissed.

II. The Courts of New York have Not Rejected Or Failed to Apply the Rule Established in *Jones v. Flowers*

Turning to the petition, it presents a question that proceeds from a false premise. The courts of New York have not "refused to apply the rule of law established in *Jones v. Flowers*." Rather, under circumstances quite different from those presented in *Jones*, the New York courts have applied a common sense exception where it appears that a party has been attempting to *avoid* a required notice.

This Court's decision in *Jones*, of course, ultimately rests upon the shoulders of *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950), where the Court announced that the means employed for giving notice "must be such as one desirous of actually informing the [intended recipient] might reasonably adopt to accomplish it."

Id. at 315; *see also Mennonite Bd of Missions v. Adams*, 462 U.S. 791, 800 (1983) ("Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party"). Over the years, the New York courts have been faithful to the due process principles which logically follow from this Court's decision in *Mullane* and its progeny. *E.g. McCann v. Scaduto*, 71 N.Y.2d 164 (1987) (applying *Mennonite* to invalidate tax lien sale). And they have been equally faithful in applying *Jones* in appropriate cases involving claims of lack of actual notice. E.g. *89 Pine Hollow Road Realty Corp. v. American Tax Fund*, 41 A.D.3d 771 (2d Dept. 2007) (applying *Jones* to require hearing on due process grounds where notice to redeem was returned unopened).

Indeed, even before *Jones*, the New York court decisions recognized the general rule that due process may require additional efforts in cases involving undelivered mail. As this Court's opinion in *Jones* confirms, the New York court holdings prior to *Jones* directly foreshadowed the due process rule that the majority ultimately endorsed. *See Kennedy v. Mossafa*, 100 N.Y.2d 1, 9 (2003), quoted in *Jones*, *supra* ("[w]e reject the view that the enforcing officer's obligation is always satisfied by sending the Notice to the address listed in the tax roll, even where the notice is returned undeliverable"). Thus, under the pre-*Jones* due process precedents of New York, and the similar precedents of many of its sister states and the rulings of most federal courts of appeal, a majority of courts across the nation followed the well-settled general rule that "when the

government learns [that] its attempt at notice has failed, due process requires the government to do something more before property is sold at a tax sale." *Jones*, *supra*, citing cases.

At the same time, however, the New York decisions, like the decision in *Jones*, have applied a fact-sensitive test that ultimately turns on the unique facts and circumstances presented to the court. In each particular case, the task of the court is to determine, under the logic of *Mullane*, whether particular efforts to give notice were reasonable calculated to succeed. As explained in *Matter of Harner v. County of Tioga*, 5 N.Y.3d 136, 141 (2005), "[d]ue process is a flexible concept, requiring a case-by-case analysis that measures the reasonableness of a municipality's actions in seeking to provide adequate notice."

We do not see anything in *Jones* which contravenes the notion that due-process-notice cases require such a "case-by-case analysis." Nor do we read *Jones* as addressing a set of facts where the intended recipient appears to have been *avoiding* a required notice. On the latter issue, the applicable precedents apply an equally well-settled rule: the effect of a written notice "cannot be avoided by refusing service of that notice." *Reliance Ins. Co. v. Mast Const. Co.*, 159 F.3d 1311, 1318 (10th Cir. 1998); *accord Committee on Grievances v. Feinman*, 239 F.3d 498, 499 (2d Cir. 2001) ("a party's constitutional right to receive actual notice of certain claims against him is not violated when he himself intentionally and successfully thwarted service of the very notice he claims not to have received").

Accordingly, it is not surprising that the courts of New York have refused to allow a party to avoid or refuse notice, and then to claim lack of notice as a defense. As the petition notes, the New York courts have typically rejected due-process-notice arguments in cases where there was proof that the intended recipient "was attempting to avoid notice by ignoring the certified mailings." *Matter of Harner, supra*; *see also Matter of County of Clinton v. Bouchard*, 29 A.D.3d 79 (3d Dept. 2006). But these decisions do not suggest a wholesale rejection by the New York courts of the rule of law established in *Jones*. Indeed, in the course of applying a "case-by-case analysis" to an argument based on *Jones*, at least one appellate court in New York has directed a hearing to determine whether, consistent with *Jones*, due process notice was properly given under the circumstances presented. E.g. *89 Pine Hollow Realty Corp., supra*.

As decisions such as *Luessenhop v Clinton County*, 466 F.3d 259 (2d Cir. 2006), teach, the state and federal courts sometimes have struggled with the application of *Jones* to a nearly infinite variety of factual and procedural scenarios. But there is no groundswell of opposition to *Jones* among the Judges on the New York state court bench. There is certainly no showing, through the cases cited in the petition, that the courts of New York have "refused" to apply *Jones* as this Court intended.

In the final analysis, the subject petition simply voices its disagreement with the result reached by the Appellate Division through a manufactured "conflict" between the New York court decisions and the precedent

announced by this Court in *Jones*. Since *Jones* did not involve circumstances suggesting an attempt to avoid service, the New York Court's decision to distinguish *Jones* on that ground cannot be viewed as a "refusal" to acknowledge this Court's authority as the final arbiter of a party's due process rights. And given petitioner's utter failure to contradict or dispute the accusation that it "willfully sought to avoid service," it hardly is in a position to hide behind the due process clause as part of a last ditch effort to contest a municipality's tax enforcement procedures. Since the procedures that were employed, in fact, provided a reasonable means of giving petitioner notice, and since the New York court found that petitioner, itself, was attempting to avoid service, this is not a suitable case for expanding on the guarantees announced in *Jones*.

CONCLUSION

For the foregoing reasons, the petition should be dismissed as untimely. Alternatively, the petition should be denied.

Respectfully submitted,

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